74-737

SUPREME COURT OF THE UNITED STATES

October Term 1974

No. A-465

LEROY HOOD - - - - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

October Term 1974

No. A-465

LEROY HOOD - - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in this case on May 31, 1974.

OPINION BELOW

The Kentucky Court of Appeals rendered a memorandum opinion, printed in Appendix A hereto, *infra*, pp. 15-16. This opinion is reported as a Memorandum Decision and ordered not to be published in 512 S. W. 2d 528. The trial court did not render an opinion.

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on May 31, 1974. A timely petition for rehearing was denied and mandate issued on September 13, 1974, printed in Appendix B hereto, *infra*, p. 17. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

This case involves a Fourth Amendment question and, while seemingly involved, the questions and circumstances are summarized as follows:

I.

Whether under the following circumstances the Fourth Amendment should extend to exclude from evidence the identification of a stolen vehicle:

(a) Where the defendant in possession, arrested by a state police officer on misdemeanor charges unrelated to the vehicle, was placed in custody in the county jail at Bardstown, Kentucky, and the vehicle impounded and towed away for storage in a privately owned garage some miles distant from the county seat;

(b) At the time of arrest no probable cause that the defendant was operating a stolen vehicle existed;

(c) A subsequent inspection of the vehicle made at the garage by the officer consisted of taking off the door post serial number and license plate number, which numbers were checked and established an apparently valid registration of the vehicle;

(d) Two or three days later the officer made a second inspection of the vehicle and at that time lifted the hidden secret I.D. number off the frame, having beforehand determined where to locate this secret number.

(e) Thereafter the lifted number was fed into the national crime reporting circuit (N.C.I.C.) and the circuit reported back a number almost identical (a difference of one digit) to a number belonging to a vehicle that had been reported stolen in Franklin County, Kentucky, some ten months beforehand.

(f) The owner of the reported stolen vehicle was then summoned to Bardstown and taken to the garage by the officer, made an exhaustive examination of both the exterior and interior of the vehicle, and identified it as his stolen pickup truck.

II.

Whether, under the above stated circumstances, the seizure (impoundment) of the vehicle without warrant or probable cause violated the protection afforded defendant by the Fourth Amendment?

III.

Whether, under the above-related or similar circumstances, the lifting of the secret identification from under the frame of a vehicle constitutes a "search" within the meaning of the Fourth Amendment?

IV.

Whether the defendant, in possession of the vehicle and subsequently charged with its theft, has standing to invoke Fourth Amendment rights?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

I.

The Fourth Amendment of The United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

II.

The Fourteenth Amendment of The United States Constitution provides in relevant part as follows:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Revised Statutes

The pertinent Kentucky Revised Statute provides as follows:

> "433.220 [1194; 2739g-58] Grand larceny; taking of vehicle without consent of owner.
>
> "Any person guilty of larceny of money or other property of the value of one hundred dollars or more shall be confined in the penitentiary for not less than one nor more than five years. Any person who unlawfully takes, drives or operates a vehicle without the knowledge and consent of the owner shall be subject to the same punishment. (1962 c 245, § 1. Eff. 6-14-62)"

STATEMENT

In June 1973 petitioner Leray Hood was tried and convicted in a Kentucky state court (the Nelson Circuit Court) for taking and operating a motor vehicle without the owner's consent, a felony under Kentucky Revised Statute 433.220. The jury's verdict sentenced Hood to four years in the state penitentiary. On appeal, the Kentucky Court of Appeals affirmed the judgment of conviction.

On Saturday evening, December 23, 1972, Trooper Collins of the Kentucky State Police, while patrolling in a remote area of Nelson County, sighted a pickup truck parked off the road. This truck appeared to the trooper to be abandoned so he pulled up behind the truck, parked and got out of his patrol car to investigate. As Collins approached the truck, petitioner

Hood raised up from the seat of the truck. Collins observed that Hood was pulling up his trousers and that there was a female companion with him. Hood came out of the truck and started arguing with Collins. The trooper then placed Hood under arrest for disorderly conduct. Hood refused to be handcuffed and get into the patrol car, so Collins called Bardstown for assistance. Officer Goatley of the Nelson County Police arrived approximately ten minutes later and the two officers handcuffed Hood and put him into the police cruiser.

Hood was then taken to the Nelson County courthouse, where he was fingerprinted, his picture taken and charged with disorderly conduct and resisting arrest. Hood was lodged in the county jail, where he remained until December 26th or 27th.[1]

When Trooper Collins first came into contact with Hood, Hood was not under suspicion of operating a stolen truck. But later, Officer Goatley told Collins of the "possibility" that Hood was driving a stolen vehicle. Collins began his investigation after Goatley told him this. He had the truck towed to Bardstown Auto Wreckers, a private garage, after Hood had been taken away. Hood did not consent to a search or seiz-

[1]The record is not entirely clear as to the exact date of Hood's release. He was arrested and locked in jail on Saturday night. The next day was Sunday and the following day, December 25th, was a holiday. Hood was brought before the County Judge, it is believed on Tuesday, December 26th, and fined on the misdemeanor charges of disorderly conduct and resisting arrest. According to the record, the affidavit and warrant for Hood's arrest on the stolen vehicle charge was taken before the County Judge on December 26, and same was executed upon Hood on the next day, December 27th.

ure of the vehicle at the time of his arrest or at any later date. At no time did either of the officers attempt to obtain a search warrant based on information that the vehicle was stolen.[2]

After the truck had been taken to the garage, where it was stored inside, Collins continued his investigation at this place. He first took the serial number off the door post of the truck and, together with the license plate number, checked and found that these numbers corresponded with a valid registration in the name of Donald Hood, brother of the petitioner. Collins described this serial number as "the wrong one." Since he was unable to identify the truck as a stolen vehicle from this, he went back to the garage on December 26, three days after petitioner's arrest. At this time he had obtained information where to find the hidden number and on this occasion he lifted the secret serial number from the frame of the truck. As Col[illegible] testified, ". . . we lifted, got the information where the secret serial number was on the frame of the truck. I located the number, made a lift of it and have it here . . ."

This number was run through the NCIC circuit. There was a one digit difference in the lifted number and a number reported back by the circuit. This latter number belonged to a vehicle reported stolen from a Sam Tracy in Franklin County, Kentucky, on Febru-

---

[2]Goatley's information must be relegated to the realm of mere suspicion, based on his own testimony that he felt "my information was not substantial enough to obtain a search warrant or attempt to investigate the incident. Further, at that time I wasn't sure". (See Appendix E hereto, *infra*, pp. 21-28.)

ary 6, 1972.[3] Therefore, Sam Tracy was called to Bardstown to attempt identification by a physical examination of the truck. On December 26, Tracy and Trooper Collins went out to the garage and Tracy proceeded to make an exhaustive examination of the truck. His search included looking inside the truck, under the hood and under the dash. As a result, Tracy identified the truck as the one stolen from him more than ten months before Hood's arrest.

At the commencement of the trial, by way of a written pre-trial motion to suppress, the petitioner first sought to assert his federal constitutional right he now seeks redress before this Court. The petitioner contended in this motion that the warrantless search and seizure of the truck in question was without probable cause and in violation of the Fourth and Fourteenth Amendments of the United States Constitution. The motion, found on page 12 of the Transcript of Record, is printed as Appendix C hereto, *infra*, pp. 18-19, and was overruled by the trial judge following a pre-trial hearing (Transcript of Evidence, pp. 14, 16).

The petitioner again raised the question of his constitutional rights in the trial court by way of a motion for a new trial, wherein he asserted that the evidence clearly established that the search and seizure was conducted without a search warrant, was not incident to his arrest, and at a point and time remote from his arrest. This motion, found at page 16 of the Transcript of Record, is printed as Appendix D hereto,

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[3]The erroneous identification number was later traced to a mistake made by the county clerk in recording the number from the bill of sale to the registration certificate.

infra, p. 19. The motion was overruled by the trial court.

On appeal, the petitioner specifically raised the federal question by way of assignment of error in his brief. The assignment specified the trial court's denial of petitioner's motion to suppress evidence and his motion for a new trial on ground that the search and seizure of the vehicle was unlawful, in violation of the Fourth and Fourteenth Amendments. The portion of the brief relied upon to support petitioner's timely assignment of error, being voluminous, is printed as Appendix E hereto, *infra*, pp. 21-29.

Finally, following the Kentucky Court of Appeals' decision affirming the judgment of conviction, the petitioner requested rehearing to bring to the court's attention the apparent inconsistency regarding the petitioner's Fourth Amendment rights as determined by the United States Supreme Court and the Kentucky Court's decision. The Petition for Rehearing, printed as Appendix F, hereto, *infra*, pp. 28-32, was denied. (See Appendix B, hereto.)

REASONS FOR GRANTING THE WRIT

I.

The decision of the Kentucky Court is in conflict with the decisions of this Court holding that a warrantless search and seizure is unreasonable *per se*, subject only to a few specifically established and well-delineated exceptions, including the so-called "automobile" exception.

The basic holdings of this Court with which the Kentucky Court's decision collide are stated and reaffirmed in the following, among others:

Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 ALR 790 (1925);

Chambers v. Maroney, 399 U. S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970);

Coolidge v. New Hampshire, 403 U. S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971).

This Court has insisted, as stated in *Chambers* (p. 51), upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution, and then only in exigent circumstances will the judgment of a police officer as to probable cause serve as a sufficient authorization for a search.

In the instant case the officer claiming possession of information that the petitioner was possibly driving a stolen vehicle, contradicted the requisite for probable cause by his own testimony to the effect that his information was not substantial enough to obtain a search warrant, or for that matter, to even investigate further.

Even had probable cause existed at the time of arrest, no exigent circumstances existed to justify a warrantless search. As stated in *Coolidge*, "... by no stretch of the legal imagination can this be made into a case where it 'is not practicable to secure a warrant'" (p. 462).

As related in our statement above, the seizure and subsequent search of the vehicle were remote both in distance and time and clearly not incident to the peti-

tioner's arrest. The petitioner was in custody and the vehicle had been immobilized by impoundment in a garage some miles distant. Further, the first inspection of the vehicle failed to uncover any evidence incriminating the petitioner, and the subsequent inspection wherein the hidden identification number was lifted was made several days later and while the petitioner was still in jail.

Nor was there any relationship between the offenses for which the petitioner was arrested and the vehicle or its contents as being an object or evidence of the commission of a crime. There is no contention that the petitioner gave his consent to the search and seizure.

The seizure and subsequent search of the vehicle without probable cause and no exigency existing, therefore, violated the petitioner's Fourth and Fourteenth Amendments rights under the holdings of this Court.

II.

Even if one proceed on the theory that the police were justified in taking the vehicle into so-called protective custody for safekeeping, once it was delivered to a private garage keeper and a routine "plain view" inspection and inventory had been made, any subsequent inspection constituted an intrusion.

The implications are of vital concern to millions of vehicle owners, as well as the petitioner, should it be allowed that the police can indiscriminately seize, detain, search and lift concealed identification numbers, not in plain view and without probable cause, of any

vehicle that comes to their attention in their numerous contacts with citizens operating motor vehicles upon the public highways.

III.

The Kentucky Court held that the petitioner had no standing—only that of a thief—to invoke Fourth Amendment rights.

This issue, of important and substantive nature, apparently has not been squarely decided by this Court. The issue is whether a person in apparent valid possession of a vehicle when arrested on an unrelated charge, who is later charged with theft of the vehicle following the seizure and search of the vehicle disclosing evidence indicating a stolen vehicle, has standing to invoke the Fourth Amendment proscriptions of unreasonable search and seizure.

This Court has held, in analogous cases, where the element of possession of the seized evidence constitutes the crime charged, that the accused charged has standing even though he deny ownership of the item seized.

> Jones v. United States, 362 U. S. 257, 80 S. Ct. 725 (1960).

In the instant case, the taking, driving and operating of a vehicle without the owner's consent constitutes the crime charged under the Kentucky statutes. All evidence adduced in the trial had below flowed from petitioner's possession of the vehicle. There was no evidence of his taking, that is, stealing the vehicle from the owner. Petitioner's conviction turned upon his possession and was the essential element in prose-

cution's case. As stated in *Jones* (page 263), the petitioner is here subjected to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation.

IV.

Another issue, apparently not heretofore squarely decided by this Court of a substantial nature, is whether under any circumstances the lifting of a hidden identification number from a vehicle is or is not a search within the meaning of the Fourth Amendment.

The Kentucky Court held that there was no search. That the only intrusion was to read the serial numbers by which to determine ownership.

The question would seem to turn upon the circumstances of whether there is an intrusion of privacy. The specific question concerning whether lifting a hidden serial number constitutes a search has, apparently, yet to be finally resolved.

In Cardwell v. Lewis, ——— U. S. ———, 41 L. Ed. 2d 325, 94 S. Ct. ——— (1974) this Court, in the plurality opinion, held that under the circumstances of the case, *where probable cause exists*, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments. A definitive rule was not stated whether the lifting of the hidden identification number would constitute a mere examination of the car's exterior or would involve an intrusion of the right of privacy such as is afforded protection under the Fourth Amendment.

The dissenting opinion in *Cardwell* held that even upon probable cause, exigent circumstances must exist to warrant the *seizure* of the vehicle itself; that the Fourth Amendment protects against unreasonable seizures, as well as searches.

CONCLUSION

In conclusion, the petitioner respectfully requests this Court to invoke its authority to review his case as it is contended that under the circumstances of this case (a) there was no probable cause, (b) no exigent circumstances existed, (c) that lifting a hidden identification number constitutes a search, and (d) that the warrantless seizure and subsequent search of petitioner's vehicle was unreasonable, in violation of his rights secured by the Fourth and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS OF KENTUCKY

RENDERED: MAY 31, 1974

No. 74-73

LEROY HOOD - - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Nelson Circuit Court
Honorable Charles R. Richardson, Judge
No. 3979

MEMORANDUM OPINION OF THE COURT BY COMMISSIONER CULLEN—AFFIRMING

(Not to be cited as authority)

On this appeal from a conviction of stealing a pick-up truck, we do not find merit in the appellant's complaint of a violation of his right against unreasonable search. Appellant's only possessory claim to the truck was that of a thief, and the only intrusion into the truck by the officer was to read the serial numbers by which to determine ownership, after the truck had been taken into protective custody following the appellant's arrest for disorderly conduct, and after the officer who read the serial numbers had been told by another officer that he had "information that the truck was stolen."

Likewise we find no merit in appellant's claim of error in the admission of testimony that he had been indicated for knowingly receiving parts stolen from another truck. The owner of the other truck testified, without objection, that parts from her truck, which had been stolen and stripped, were found on the truck that the appellant was on trial for having stolen. On cross-examination she was asked whether "any charges were ever brought against anyone for stealing" her truck, to which she answered, "No, sir." On redirect examination she was asked, over objection, whether an indictment had been brought for the stolen *parts*, and she replied that the appellant had been indicted for "knowingly receiving stolen property of the tires and things."

Aside from the fact that the appellant opened up the question of criminal charges having been brought with respect to the other truck, it is plain that any prejudice the appellant may have suffered from the testimony that he had been indicted for receiving the stolen parts was insignificant in the light of the testimony, to which he did not object, that the stolen parts were on the truck he was on trial for stealing, and that the parts were stolen several weeks after the appellant claimed to have purchased the truck with the parts on it.

The judgment is affirmed.

All concur.

Attorney for Appellant:
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APPENDIX B

APPELLANT'S PETITION FOR REHEARING DENIED—9-13-74

MANDATE

THE COMMONWEALTH OF KENTUCKY, THE COURT OF APPEALS | 74 Term—May 31, 1974

LEROY HOOD

v.

COMMONWEALTH OF KENTUCKY

Appeal from a judgment of the Nelson Circuit Court # 3979, File # 74-73

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

(s) Frances Jones Mills, C. C. A.

A copy—Attest:
Issued Setpember 13, 1974

APPENDIX C

NELSON CIRCUIT COURT

No. 3979

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

LEROY HOOD - - - - - - - - *Defendant*

MOTION TO SUPPRESS EVIDENCE

Defendant, Leroy Hood, moves the Court to suppress and exclude any and all evidence obtained as a result of the illegal entry and search of the defendant's vehicle and the illegal arrest of the defendant on or about December 23, 1973, on the following grounds:

1. That the search was unreasonable, in violation of Section 10 of the Kentucky Constitution and the 4th and 14th Amendments of the United States Constitution.

2. The search and seizure of defendant's vehicle and its contents was without a warrant or the consent of the defendant.

3. No probable cause existed for the defendant's arrest.

4. No probable cause existed for the search and seizure of the defendant's vehicle.

5. The defendant's arrest was incidental to and a mere pretext for the search.

WHEREFORE, defendant prays that said evidence be suppressed and held by the Court inadmissible in this cause

against this defendant. Defendant further requests a hearing before trial and out of the presence of the jury.

Joseph A. Biagi
Richard Barlow
Attorneys for Defendant

APPENDIX D

MOTION FOR NEW TRIAL

Defendant, Leroy Hood, by counsel, moves the Court to set aside the verdict returned in the above-entitled action on June 15, 1973, and the judgment entered thereon on June 15, 1973, and to grant a new trial on the following grounds:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The court erred in overruling defendant's Motion to Suppress Evidence following the pre-trial hearing on said motion wherein the evidence clearly established that the search and seizure was conducted without a search warrant and was not incident to the defendant's arrest, but was in fact conducted separate and independent of said arrest, and that the testimony of Trooper Collins established that a "secret" serial number was "lifted" from the truck at a point and time several days removed from the defendant's arrest. Further, the testimony of Officer Goatley established that a search warrant could not have been applied for and legally issued prior to this independent search.

4. The court erred in allowing Mrs. Ruth Hayes to testify, over defendant's objection, that the defendant had been indicted on the charge of "Knowingly Receiving

Stolen Property," which property she testified consisted of the seats, tires and sun visor of a truck that was stolen from her and later found stripped, which truck was not the vehicle for which the defendant was charged in this action, which objectionable testimony was so highly prejudicial that the defendant did not receive a fair and impartial trial.

This motion is based upon the records and proceedings in this action.

Respectfully submitted,

Joseph A. Biagi
Richard Barlow

By_____

Attorneys for Defendant

APPENDIX E

[PORTIONS OF BRIEF FOR APPELLANT]

COURT OF APPEALS OF KENTUCKY

File No. 74-73

LEROY HOOD - - - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

May it please the Court:

STATEMENT OF THE CASE

I. The Nature of the Proceedings

This is an appeal from a criminal conviction in the Nelson Circuit Court, Honorable Charles R. Richardson, presiding.

On February 26, 1973, the Grand Jury of Nelson County returned an indictment (No. 3979), charging the defendant Leroy Hood, with the offense of taking and operating an automobile owned by Sam Tracy without his knowledge and consent in violation of KRS 433.220. Hood was tried by Petit Jury on June 14 and June 15, 1973, and found guilty as charged and sentenced to four years in the Kentucky State Penitentiary. The defendant made a pre-trial motion to suppress evidence (TR 12) on the ground that the warrantless search of his vehicle was unreasonable, in violation of the Kentucky and United States Constitutions. Hood is free on bond pending this appeal.

* * * * * * *

ARGUMENT

Defendant stated as ground in his motion to suppress that the search was unreasonable, in violation of Section 10, the Kentucky Constitution, and Amendments 4 and 14 of the United States Constitution. This issue was also raised by motion for new trial timely filed. The violation of defendant's constitutional right against unreasonable search and seizure, both under the state and federal constitutions, was thus specifically raised.

I.

The Trial Court Erred in Denying Defendant's Motion to Suppress Evidence and His Motion for a New Trial on the Ground That the Search and Seizure of the Vehicle Was Unlawful.

A search without a warrant is deemed to be per se unreasonable, subject to several well delineated exceptions. The Fourth Amendment to the Constitution of the United States and Section 10 of the Kentucky Constitution affords protection against warrantless searches and seizures.

An important exception to the constitutional prohibition against unreasonable searches and seizures is the right of an arresting officer to search and seize without a warrant incident to a legal arrest. This exception can be narrowed for the purpose of this discussion to the validity of the search and seizure of a motor vehicle following the arrest of the driver for a minor violation.

This Court has held that an arresting officer has the right to search the person of a prisoner lawfully arrested and take from his person any property connected with the offense for which he is arrested, or any weapon or thing that might enable the prisoner to escape or do some act of violence. As stated by this Court in *Lane* v. *Commonwealth*, Ky., 386 S. W. 2d 743 (9165) at page 745:

> "Hard reality demands that the person in custody be disarmed in order to protect the officer from harm, to prevent the escape of the arrestee, or the destruction of evidence which pertains to the offense for which he was detained."
>
> * * *
>
> "It is our opinion that when a person is arrested for a traffic or other minor violation, the mere fact of the arrest does not give to the officer absolute right to search the vehicle or the premises indiscriminately."

The above decision of the Kentucky Court is subject of an annotation in 10 ALR 3d 314. The following comment is found on page 325:

> "On appeal, the reviewing Court reversed, the Court stating that when a person is arrested for a traffic or other minor violation, the mere fact of arrest does not give to the officer the absolute right to search the vehicle or the premises indiscriminately. The Court said that while its opinion in this case should not be construed to mean that a person in custody may not be searched in order to be disarmed, or to prevent escape or the immediate destruction of evidence for which he was detained, in the case at bar there were no facts of an extreme emergency, the Court noting that the defendant had been arrested, searched, and placed in another car, and adding that if the arresting officer was interested in a search of the defendant's automobile, he might have obtained, upon proper ground, a search warrant. The Court then said that it agreed with the principle that an arrest may not be used as a pretext to search for evidence, and concluded that the lower Court erred in overruling defendant's motion to suppress the evidence in question."

In *Ison v. Commonwealth*, Ky., 471 S. W. 2d 712 (1971), the trooper stopped Ison for failing to dim his lights at

night, after noting that the car had Harlan County license plate and was heavily loaded with something. Ison could not furnish a registration certificate for the vehicle and furnished a fictitious name as owner of the car. After placing Ison in his cruiser, the trooper without a warrant or permission, opened the trunk and discovered ten cases of whiskey. Ison was convicted for transporting in dry territory.

In the opinion, this Court reaffirmed that warrantless searches are per se unreasonable subject only to a few specifically established and well-delineated exceptions "which are jealously and carefully drawn." The Court, citing *Coolidge* v. *New Hampshire*, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), stated:

> "The Coolidge case reaffirms the basic holding in Carroll v. United States * * * that was approved in Chambers v. Maroney * * *. The Carroll decision was that contraband goods concealed and illegally transported in an automobile may be searched for without a warrant provided that 'the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."

It is felt that the Court thus expanded the exception in the *Ison* case to include circumstances where the arresting officer has probable cause to believe that some other crime than the minor offense for which he has stopped the driver has been committed.

The Court concluded its opinion as follows:

> "The word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears. (Per Justice Stewart in Coolidge . . .). We are unable to justify the warrantless search as incident to an arrest, nor on evidence observed in

'plain sight', nor on probable cause to believe that the transportation of contraband was in the course of being effect upon facts observed after a proper stopping of the vehicle. The warrantless search was constitutionally impermissible under the facts presented by the record. The evidence of the fruits of that search was inadmissible and should have been suppressed."

In addition to the above prerequisites to a valid search without warrant incident to an arrest, it is held generally that the search must be contemporaneous with the arrest; otherwise it would be invalid. If the search is too remote in time or place, the search would be unlawful. See Am. Jur., Searches and Seizurers 1st ed. Sec. 19; 10 ALR 3d page 328.

As pointed out in the ALR annotation, the leading case in support of this rule is *Preston* v. *United States*, 376 U. S. 364, 11 L. ed. 2d 777, 84 S. Ct. 881 (1964), which involved arrest on a vagrancy charge, where defendants were convicted of conspiring to rob a bank, largely on evidence obtained by the officer's search of the car after defendants had been arrested, searched, and taken to headquarters, and the car had been removed to a garage.

In the *Preston* case the Supreme Court held that the evidence so obtained was inadmissible because the search of the car was without a warrant, was too remote in time or place to have been made as incidental to the arrest, and was therefore violative of the test of reasonableness under the Fourth Amendment. The usual justifications for a warrantless search are absent where the search is remote in time or place from the arrest, and once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. Nor, continued the Court, since the men were under arrest at the police station and the car was in the police custody at the garage, was there any danger that the car would be moved out of the locality or jurisdiction.

In the same annotation (10 ALR 3d at page 329), this Court's decision in *Flannery* v. *Commonwealth*, Ky., 324 S. W. 2d 128 (1959), is discussed as follows:

> "In Flannery defendant was arrested for operating a motor vehicle with defective lights, and his companion . . . for public drunkenness, and after they were jailed, their truck was forced open and searched by the arresting officer, and several cases of beer and liquor were discovered, which formed the basis of (their conviction for transporting). On appeal, the Court upheld defendant's argument that the search was invalid, for it was made sometime after the arrest and after both defendant and the truck had been taken to the county jail. The Court reasoned that the search was not made incident to the arrest nor in defendant's immediate presence, and the Court held as prejudicial error the admission of evidence obtained as a result of the search."

Relating the facts and circumstances of the present case of defendant Hood to the applicable law, it is observed that the search and seizure of the vehicle occupied by Hood was without a warrant or the consent of defendant. No contention was made at any time by the Commonwealth that the search was made by warrant or consent of the accused. Therefore, the burden of reasonableness of the search must shift to the Commonwealth to establish that it was within the established exceptions.

At the time of Hood's arrest for disorderly conduct, the arresting trooper had no reasonable basis or probable cause to believe that Hood was in possession of a stolen vehicle (TE 35). The testimony of Officer Goatley that he passed on information to the trooper "as to a truck that had been stolen from Mr. Sam Tracey of Franklin County" (TE 35) and that he recognized the truck as being the "same one

that I had been investigating" (TE 36) must be relegated to the realm of sheer suspicion, based on the officer's own testimony:

> "8. Now, sir, tell us why you didn't pick up the defendant in this truck at the times you said you had seen him operating it prior to the date you were called by Collins to assist in the arrest of the defendant?
>
> A. Yes. I felt that my information was not substantial enough to obtain a search warrant or attempt to investigate the incident. Further, at that time I wasn't sure" (TE 43).

Furthermore, the inference must be drawn that the officers had insufficient probable cause at the time of Hood's arrest on December 23 to charge him with operating a stolen vehicle, for it was not until December 26 after the hidden secret serial number had been lifted from the frame several days after his arrest, that they had information sufficient to swear out a warrant that there were reasonable grounds for believing that Hood had committed the offense (TR 4).

As stated in the *Ison* case, "it is extremely doubtful, at best, whether a search warrant could have legally issued, had it been applied for," based on the circumstances after Hood's arrest and before the general exploratory search of the truck after it had been removed to the garage.

Furthermore, after the arrest of Hood and his restraint in jail, there was more than ample opportunity to obtain a search warrant had reasonable grounds existed.

The evidence clearly established that there was no justification for the search incident to the arrest, nor on evidence observed in plain sight. To the contrary, the incriminating evidence was obtained in the course of an independent and unrelated search made several days later inside the garage, at which time the trooper lifted the hidden, secret serial number.

In addition, the holdings of the Supreme Court in the *Preston* case and of this Court in the *Flannery* case apply. The search was invalid because it was too remote in time or place to have been incidental to the arrest, and was therefore violative of the test of reasonableness.

In conclusion, it is submitted that the following statement of this Court found in the *Lane* decision, is apropos to this case:

> "The case at bar did not offer facts of an extreme emergency. Appellant had been arrested, searched and placed in another car. If the arresting officer was interested in a search of the automobile, he might have obtained, upon proper ground, a search warrant" (page 745).

* * * * * * *

APPENDIX F

[PORTIONS OF APPELLANT'S PETITION FOR REHEARING]

* * * * * * *

The appellant respectfully requests the Court to rehear his appeal and files this Petition for Rehearing to bring to the Court's attention what appears to be the inconsistency regarding the appellant's Fourth Amendment rights between the Court's Memorandum Opinion herein, rendered May 31, 1974, and the application of the law as determined by the United States Supreme Court.

The Memorandum Opinion, holding that there was no merit in appellant's complaint of a violation of his right against unreasonable search, is founded on the reasoning:

(1) That appellant's only possessory claim to the truck was that of a thief, that is to say in effect, that appellant had no standing to complain, and,

(2) The only intrusion into the truck by the officer was to read the serial numbers by which to determine ownership, in effect, holding that there was no "search."

In regard to the issue of the appellant's standing, we point out that the Commonwealth did not attempt to justify the "search" on this ground and, therefore, the contention of appellant's lack of standing was not raised on appeal or at the trial had below.

The appellant was indicted for taking and operating a motor vehicle without the owner's consent. At the time of his arrest for disorderly conduct he was in possession of the truck and one of the arresting officers was aware that he had openly operated the vehicle for several months before. The same day of the arrest, the officers had the truck towed to a private garage and made the usual routine "inspection," that is, they took down the serial number found on the door post, checked it out and determined from this investigation that appellant's possession had the indicia of legitimacy.

Of controlling importance, we believe, are the facts that the appellant had been detained in jail and the truck "immobilized" by impoundment under police authority.

It is contended that at this point in time, if the appellant has standing, the further acts of the officer two or three days later, in going back to the garage and searching for, and lifting, the secret serial number, constituted an unreasonable intrusion of appellant's privacy. Not only was this remote in time, but no exigency existed as the vehicle was impounded and appellant was confined in jail some miles distant. If the other officer had reliable information (which he testified he did *not* have), there was clearly ample opportunity to obtain a search warrant.

In analogous cases, where the element of possession of the seized evidence constitutes the crime charged, the Supreme Court has held that the defendant charged has standing even though he denies ownership of the item seized.

In *Jones* v. *United States*, 362 U. S. 257, 263, 80 S. Ct. 725, 732 (1960), the Court stated that "to hold to the contrary, that is, to hold that petitioner's failure to acknowledge interest in the narcotics or the premises, prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." The Court stated "Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government."

In the instant case, the taking, driving and operating of the truck without the owner's consent constitutes the crime charged; thus, possession of the vehicle is an essential element. It follows that the Supreme Court's holding that where a possessory crime is charged, the indictment suffices to confer standing, is applicable. (See United States v. West, 453 F. 2d 1351, 3d Cir. 1972).

Therefore, it is contended that the appellant has standing under the Supreme Court's ruling to seek redress of his Fourth Amendment rights of the United States Constitution.

Further, it is contended that it is in conflict with the Supreme Court's decisions to hold that inspection of a

vehicle's identification number is not a search subject to the proscriptions of the Fourth Amendment.

In U. S. v. Powers, 439 F. 2d 373 (1971, USCA, 4th Cir.), it was held that such an inspection is a search subject to the proscriptions of the Fourth Amendment. There the Court stated:

> "*Davis* v. *Mississippi*, 394 U. S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) and *Terry* v. *Ohio*, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), compel the conclusion, we believe, that inspection of a car's identification number is a search subject to the proscriptions of the Fourth Amendment. * * *: Police actions in each case, the Court held, involved governmental invasion of a person's privacy and, therefore, its fruits were subject to the exclusionary rule that the Court has fashioned to enforce the Fourth Amendment. Similarly, inspection of a vehicle's identification number, which necessarily requires examining parts of the car not in plain view, may intrude on the occupant's privacy by unlawfully detaining them. If the evidence that the inspection produces is to be used against them, it must be obtained, just as in *Davis* and *Terry*, by conduct sanctioned by the Constitution."

To require less, the Court stated in the above opinion, or the refusal to treat the inspection as a search, could thwart rights secured by the Fourth Amendment by subjecting the owners of vehicles to unrestrained governmental intrusion.

We are constrained to quote from a dissenting opinion in *U. S.* v. *Johnson*, 431 F. 2d 441 (1970) (USCA, 5th Cir.), where the majority opinion held that such inspections did not constitute a search, or if it were a search, it was not unreasonable. In the dissent, Judge Godbolt said:

> "In our increasingly complex world our motor vehicles are not the only things numbered for identification,

So are such tangible effects as household appliances, lawn mowers, outboard motors, and even the watches on our wrists. Add to the list such papers and documents kept in the home, safe deposit box or on the person, as bank checks, driver's licenses, social security cards, insurance policies, securities and deeds and mortgages, and the automobile registration papers often carried in the glove compartment of the car. All of these items have primary or secondary qualities of identification, but this does not subject them, when not in plain view, to being sought out by police action beyond the reach of the Fourth Amendment."

In conclusion, for reasons stated herein, we respectfully petition for rehearing of appellant's appeal.

(s) Joseph A. Biagi
Attorney for Appellant

Supreme Court, U. S.
FILED
JAN 13 1975

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-737

LEROY HOOD .....PETITIONER

VS:

COMMONWEALTH OF KENTUCKY....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-737

LEROY HOOD .....PETITIONER

VS:

COMMONWEALTH OF KENTUCKY....RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below from the Kentucky Court of Appeals is a Memorandum Opinion, not to be cited as authority, and is reported at 512 S.W.2d 528 (1974) and is correctly set forth in the petitioner's Appendix A, pages 15-16, of his Petition for Writ of Certiorari.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. §1257(3), the proper provision for review of a state court judgment in a criminal case on certiorari.

The petitioner premises his petition for a writ of certiorari upon four contentions which he argues reflect a violation of his constitutional rights under the Fourth and Fourteenth Amendments.

Respondent submits that for purposes of jurisdictional clarity, the questions found under the heading of "Questions Presented" in petitioner's petition, can be logically simplified and restated into two contentions. Questions I, II, and III can be combined into the contention (1): Whether a police officer can examine an automobile for a vehicle identification number, whether hidden (Confidential Vehicle Identification Number [CVIN] or plainly visible (Public Vehicle Identification Number [PVIN]), without violating the search and seizure rights of the Fourth Amendment where he has legitimate grounds for doing so, not amounting to probable cause? Question IV can be rephrased into the contention (2): Whether a person charged with the thievery of a stolen motor vehicle has standing to object to the warrantless "search" of the vehicle identification number (VIN) of that stolen vehicle?

The respondent respectfully disagrees with petitioner's contentions and submits that petitioner's petition for writ of Certiorari be denied.

(1) To contend that examining and copying of a vehicle identification serial number by a police officer of a properly impounded motor vehicle is a search thereof in violation of the Fourth Amendment is without substance. See *United States v. Graham*, 391 F.2d 439 (6th Cir. 1968). At the time of the arrest of the petitioner for

disorderly conduct and resisting arrest, the arresting officer learned from a companion police officer that the truck had been stolen. After the truck had been impounded at the tow-in lot, he routinely entered the door post serial number (PVIN) and license plate number into the National Crime Information Center (N.C.I.C.), the response to which negated theft. The arresting officer subsequently copied the secret serial number (CVIN) from underneath the chassis' frame and a computer check confirmed the officer's anticipation of a stolen vehicle.

In the case at bar, nothing from the interior of the vehicle and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced into evidence.

Petitioner contends that the decision below collides and conflicts with the rulings of *Carroll v. U.S.*, 267 U.S. 132, 69 L.Ed. 543, 53 S.Ct. 280 (1925); *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct 2022 (1971). Such is not the case.

Coolidge, supra, involved an extensive search of the entire vehicle including the interior from which, by vacuum sweepings, incriminating evidence was obtained. *Coolidge* is inapposite because it involved the warrantless search of an automobile carried out pursuant to a criminal investigation where the only conceivable purpose of such an investigation was the discovery of instrumentalities of the crime. A search of that kind raises different and additional considerations not present in the copying of a ve-

hicle identification number for which there was no reasonable expectation of privacy. The vehicle identification number in itself is not evidence of a crime, but it may lead to the identity of the true owner.

Petitioner's reliance on the underlying rationale of the *Carroll-Chambers* line of decisions, is without merit because clearly the vehicle being operated by petitioner was lawfully impounded and in proper police custody. There were no exigent circumstances so as to bring into consideration the decisions of *Carroll* or *Chambers,* supra. The prior impoundment of the vehicle was not a constitutional barrier to the copying of its CVIN and its use to determine thievery. Again, we are not confronted with any issue as to the propriety of a search of a car's interior.

Stated simply, this is not a significant case of a citizen's invasion of privacy or unwarranted intrusion into that constitutionally protected area. Here, the invasion, "... if it can be said to exist, is abstract and theoretical." *Air Pollution Variance Board v. Western Alfalfa Corp.*, ——— U.S. ——— ———, 40 L.Ed.2d 607, 611, 94 S.Ct. ——— ——— (1974).

Numerous federal cases have held that the examination of an automobile for purposes of identifying it may be conducted within certain limits by a police officer having a legitimate ground for doing so, not amounting to probable cause, without violating Fourth Amendment's rights, *U.S. v. Williams,* 434 F.2d 681 (5th Cir. 1970). Some of these cases have been decided on the theory that an examination of a vehicle identification number, although necessitating an opening of the door, is not a

search at all. See *Cotton v. U.S.*, 371 F.2d 385 (9th Cir. 1967). Others hold that such an entry is a search but one justified because of the limited intrusion and the quasi-public nature of the identification number, *U.S. v. Powers*, 439 F.2d 373 (4th Cir. 1971).

This Court concluded in *Cardwell v. Lewis*, ____ U.S. ____, 41 L.Ed. 2d 325, 94 S.Ct. ____, 1974, that the probable cause examination of the exterior of the vehicle and taking of paint scraping therefrom were reasonable and that this action did not invoke the right to privacy which the interposition of a warrant requirement is meant to protect.

The ruling of the Kentucky Court of Appeals that there was no search where the only intrusion was to read the hidden identification serial number in order to determine ownership is in solid accord with the vast weight of Federal authority. This ruling does not necessitate the discretionary exercise of this Court's review by certiorari.

(2) Petitioner contends that he has "standing" to invoke his Fourth Amendment rights so as to suppress the hidden vehicle identification number that was copied and used to determine that he was operating a stolen vehicle in violation of state law. With regard to the issue of "standing" of a thief to raise constitutional issues of search and seizure, petitioner argues that this issue has not heretofore been decided by this Court. This contention is without foundation.

The mere presence of a search and seizure question without more, is insufficient to warrant review by certiorari. In order for such an issue to fall within the scope

of review proffered by a writ, the question must be novel, unsettled, or a conflict of decisions must exist. None of the above grounds are applicable. The decision of the Kentucky Court of Appeals was adequately supported by the Kentucky cases of *Iles v. Commonwealth*, Ky., 476 S.W. 2d 170 (1972); *Pruitt v. Commonwealth*, Ky., 286 S.W. 2d 551 (1956); *Commonwealth v. Johnson*, Ky., 420 S.W.2d 103 (1967); the latter case citing *Jones* v. United *States* 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725 (1960). These Kentucky decisions are not in conflict with *Jones*, supra. *Jones* liberalized the "standing" requirement significantly, mitigating its earlier harshness. It conferred "automatic" standing on one charged with illegal possession, thereby permitting him to challenge the seizure of those goods, the possession of which was the gravamen of the offense. *Jones* explicibly broadened the class of persons protected by taking the "standing" which was already available to persons who had a proprietary or possessory interest in the premises and extending it to all who are legitimately upon the premises. *Jones*, 362 U.S. at 267, 4 L.Ed.2d at 406, 80 S.Ct. at 734, stated:

> . . . No just interest of the government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him . . .

Significantly for present purposes, the language of *Jones* then immediately underscored its measured use of the adverb "legitimately" by standing the converse:

> *. . . This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched . . .* (Emphasis supplied)

It is the "legitimately on the premises" aspect of the petitioner's relationship to the automobile "search" that concerns us in the case at bar. In interpreting the "legitimately on the premises" aspect of *Jones*, the Kentucky Court of Appeals has denied "standing" to trespassers in or upon real property. *Smith v. Commonwealth*, Ky. 375 S.W.2d 242 (1964); *Combs v. Commonwealth*, Ky., 341 S.W.2d 774 (1961). This rationale applies with equal vigor to the thief of the stolen automobile. The overwhelming weight of federal authority and reasoning of sister states squarely hold that the thief has no "standing" in the stolen automobile. See *State* v. *Cohn*, Fla. App., 284 So.2d 426 (1973); *Palmer* v. *State*, Md., 286 A.2d 572 (1972); *State* v. *Pokini*, 45 Haw. 295, 367 P.2d 499 (1961); *Slyter* v. *State*, 246 Miss. 402, 149 So. 2d 489 (1963); *Harper* v. *State*, 84 Nev. 233, 440 P.2d 893 (1968); *State* v. *Edmonds*, *Mo.*, 462 S.W. 2d 782 (1971); *Kaufman* v. *U.S.* 323 F. Supp. 623 (E.D. Mo. 1971); *Meade* v. *Cox*, 310 F.Supp. 233 (W.D. Va. 1970); and *Williams* v. *U.S.* 323 F.2d 90 (10th Cir. 1963).

The petitioner has failed to establish in what manner the decision of the Kentucky Court of Appeals is at variance with any prior decision of this Court and other federal or sister state jurisdictions. To the contrary, the respondent submits that this contention presents no unsettled federal question and is in fact foreclosed to the petitioner because it properly falls within the prior con-

trolling decision of *Jones,* supra. This being so, the respondent submits that the petitioner has failed to establish a jurisdictional basis.

In summary, the respondent submits that the petitioner's application for Petition For Writ should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. 1257(3).

The respondent will not endeavor to respond to both of the above contentions as though these contentions are properly before the Court, even though respondent maintains that they are not.

QUESTIONS PRESENTED

I

Whether a police officer can examine a motor vehicle's identification number for purposes of identifying it without violating Fourth Amendment Rights Against An Unreasonable Search and Seizure, where he has legitimate grounds for doing so, not amounting to probable cause?

II

Whether one charged with the thievery of a stolen motor vehicle in violation of state statutory law has standing to object to the warrantless "search" of that vehicle for its vehicle identification number in violation of the Fourth Amendment provisions of illegal search and seizure?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional Provisions of the Fourth and

Fourteenth Amendments and Kentucky Revised Statute 433.220 have been properly set forth in petitioner's Petition For Writ at pages 4-5.

COUNTERSTATEMENT OF THE CASE

Petitioner complains that there was an illegal search of an impounded motor vehicle which he had been operating when the arresting officer, at a latter date, copied the secret vehicle identification number (CVIN) from underneath the chassis of the vehicle at the tow-in lot. The unique circumstances of this alleged "search" set this case apart from the usual search and seizure situation.

The petitioner was arrested for disorderly conduct and resisting arrest after having an altercation with a police officer on a deserted roadway. It was at this point that the arresting officer was advised by a companion police officer that the latter had information that the vehicle had been stolen as per his own independent investigation. Because both occupants of the vehicle were arrested and taken to jail, the officers had the right and the duty to have the vehicle impounded for safekeeping.

Once the vehicle was impounded, it was routine procedure for the law enforcement officials to check the serial number on the door post (PVIN) and the license plate number, which reflected that the vehicle was registered to the brother of the petitioner. The following day, the arresting officer learned where to locate the secret serial number (CVIN) on the underneath frame of the pickup truck. The number was copied and a trace in the National Crime Information Center (N.C.I.C.) lead to the discovery of the stolen nature of the vehicle. The

petitioner was tried and convicted in a Kentucky state court (the Nelson Circuit Court) of the offense of taking and operating a motor vehicle without the owner's consent, a felony (Kentucky Revised Statute 433.220). On appeal, the Kentucky Court of Appeals affirmed the judgment of convicted.

ARGUMENT

I

A LAW ENFORCEMENT OFFICER, HAVING LEGITIMATE GROUNDS FOR DOING SO ALTHOUGH NOT AMOUNTING TO PROBABLE CAUSE, MAY EXAMINE A MOTOR VEHICLE'S IDENTIFICATION NUMBER, WHETHER PLAINLY VISIBLE (PVIN) OR SECRETED UNDER THE CHASSIS (CVIN), FOR PURPOSES OF IDENTIFYING IT AND NOT THEREBY VIOLATE SEARCH AND SEIZURE RIGHTS SECURED BY THE FOURTH AMENDMENT.

Many federal circuits have consistently admitted evidence of a motor vehicle's identification number without a search warrant on the theory that the inspection which disclosed it was not a search within the meaning of the Fourth Amendment, or alternatively, that the search was reasonable, or that the accused lacked standing to contest it. *U. S. v. Ware*, 457 F.2d 828 (7th Cir. 1972); *U. S. v. Squires*, 456 F.2d 967 (2nd Cir. 1972); *U. S. v. Powers*, 439 F.2d 373 (4th Cir. 1971); *U. S. v. Williams*, 434 F.2d 681 (5th Cir. 1970); *U. S. v. Polk*, 433 F.2d 644 (5th Cir. 1970); *U. S. v. Johnson*, 413 F.2d 1396 (5th Cir. 1969); *U. S. v. Self*, 410 F.2d 984 (10th Cir. 1969); *U. S. v. Graham*, 391 F.2d 439 (6th Cir. 1968);

Cotton v. *U. S.*, 371 F.2d 385 (9th Cir. 1967). Contrastingly, only one federal circuit court of appeals, in a 4-2 decision, has held a warrantless search to be illegal--and the number of inadmissible in evidence—when the vehicle's inspection was not incident to a lawful arrest. *Simpson* v. *U. S.*, 346 F.2d 291 (10th Cir. 1965). Respondent would point to the dissenting opinion of Judges Pickett and Murrah in *Simpson*, id. at page 296 as the correct interpretation of the law regarding this issue, which is in accord with the decisions of the other circuits.

Two significant factors affecting the legality of a search for identification numbers are first, the mobility of a motor vehicle, see *Carroll* v. *U. S.*, 267 U.S. 132, 69 L.Ed.543, 45 S.Ct. 280 (1925); and second, the "expectation of privacy" that a person may reasonably claim for those parts of his vehicle where identification numbers are posted. Cf. *Katz* v. *U. S.*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967) (Mr. Justice Harlan concurring).

This Court has long distinguished the search of automobiles from the search of buildings. But mobility alone does not justify unbridled search of those parts of a vehicle where one has a reasonable expectation of privacy. Thus, warrantless searches of the trunk, the glove compartment, the console or similar areas have been approved only within strict limitations, such as the requirement of probable cause to search the car, Chambers v. Maroney, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970), or a search incident to a lawful arrest. *Preston* v. *U. S.* 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881 (1964); or a showing the car itself was contraband,

Cooper v. *California*, 386 U.S. 58, 17 L.Ed 2d 730, 87 S.Ct. 788 (1967).

In *Harris* v. *U. S.*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 692 (1968), a search of a vehicle was upheld where the officer went to the lot where the vehicle was impounded to secure its contents. The officer there opened the door of the vehicle and found incriminating evidence of a crime in plain view. Also, in *Cady* v. *Dombroski*, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973), this Court upheld the search of the trunk of an impounded vehicle. Further in *Cardwell* v. *Lewis*, U.S., 41 L.Ed.2d 325, 94 S.Ct. 1974), a limited warrantless "search" of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle were deemed not an unreasonable invasion of the right to privacy.

Inspection of a car's identification number differs from a search of a vehicle and seizure of its contents in one important aspect. The occupants of the car cannot harbor an expectation of privacy in the serial number. States require manufacturers to identify vehicles by affixing identification numbers which are quasi-public information, and the viewing of such numbers is but a minimal invasion of one's privacy. A police officer, therefore, should be freer to inspect the numbers without a warrant than he is to search a car for purely private property.

Therefore, because of the substantial weight of federal authority, where there is a legitimate reason to do so, the mere checking of the serial number of an automobile in order to more positively identify it, is not a search

within the prohibition of the Fourth Amendment. Manufacturers are required to place serial numbers on vehicles as an aid in identifying them. An automobile runs and stops on the public roads, where viewers may crawl under it or press their faces against its windows. Its exterior and much of its interior are within the plain view of the casual or purposeful onlooker, and thus are not protected by the Fourth Amendment from searching eyes. Opening the car door, looking under the hood, or crawling under the car to inspect the secreted VIN number does not independently bring an inspection of the VIN within the scope of the Fourth Amendment. Moreover, even if such an investigation is considered to be a "search," it is argued that it is a reasonable one where the searcher has reliable information to believe that a vehicle of like kind has been stolen. The arresting officer was informed that the pickup truck was stolen as per information from a companion police officer who had made an independent investigation. There could scarcely be a more appropriate case for identifying a motor vehicle's identification number. The number in itself is not evidence of a crime, but it may lead to the identity of the true owner. So long as the inspection is justified, not based on an inarticulate hunch, and is not a pretext for an exploratory search, it is well within the concept of reasonableness which defines the essential Fourth Amendment boundary within which law enforcement officers must proceed.

II

ONE CHARGED WITH THE THIEVERY OF A STOLEN MOTOR VEHICLE IN VIOLATION OF STATE STATUTORY LAW HAS NO STANDING TO OBJECT TO THE "SEARCH" OF THAT VEHICLE FOR ITS IDENTIFICATION NUMBER ON THE BASIS OF THE FOURTH AMENDMENT.

No one contends in this case that the petitioner owned or had a possessory right of any kind in the automobile. The motor vehicle had been stolen. Petitioner had no right to be in it in the first place and he had no right to forbid anyone to enter it. He offered no proof of his right of possession. Courts should always be diligent in preventing the lowering of the barriers which protect the individual liberties of our citizens, but in the exercise of this diligence the personal and property rights of members of the public should not be overlooked for the benefit of those who have regard for neither.

The overwhelming weight of authority and the better reasoning are represented by the cases which hold squarely that a thief has no "standing" in a stolen automobile. Even more compelling than the precedent from other jurisdictions in accord with the decision of the Kentucky Court of Appeals, however, is the inherent logic of the proposition. No valuable social purpose or constitutional significance could conceivably be served by extending the protection of the Fourth Amendment to a thief in the enjoyment of a stolen automobile.

CONCLUSION

The issues presented by the petitioner alleging a denial of federally protected constitutional rights have been raised in the courts below and were resolved adversely to petitioner's contentions. Thus they may not be a basis for the granting of certiorari review. Moreover, the petitioner has failed to meet the jurisdictional requirements of 28 U.S.C. §1257(3). Furthermore, petitioner has failed to establish that the issues he now presents actually involve any real significant conflict of decisions between or among other state or federal courts. For the foregoing reasons, the respondent requests that the petition for writ of certiorari be dismissed.

Respectfully submitted,

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PROOF OF SERVICE

I, Miles H. Franklin, counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of January, 1975, I served the petitioner with Brief for Respondent in Opposition, by placing 6 copies of the same in the United States mail, first class postage prepaid, and addressed to Hon. John G. O'Mara, 607 West Ormsby Avenue, Louisville, Kentucky 40203; and Hon. Joseph A. Biagi, 726 Main Street, Shelbyville, Kentucky 40065, Counsel for Petitioner.

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